NO. 82-6950

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT SANTIAGO,
Appellant

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

WILLIAM P. JAMES
915 Robinson Building
Philadelphia, Pennsylvania 19102
(215) 569-2525
Attorney for Appellant

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QUESTION PRESENTED

1. Is the Pennsylvania Statute which creates and defines the crime of "murder of the second degree" unconstitutional as being repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution where "malice", an essential element of that crime, is conclusively presumed simply from proof that a killing was done during the perpetration of a felony (felony-murder)?

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT SANTIAGO,
Appellant

JURISDICTIONAL STATEMENT ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

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1. OPINION BELOW

The Per Curiam Judgment and Order, without written Opinion, of the Supreme Court of Pennsylvania, dated April 27, 1983, affirming the Judgments of Sentence imposed by the Court of Common Pleas of Philadelphia County, Criminal Trial Division, is attached hereto in the Appendix to this Jurisdictional Statement.

The trial Court, the Court of Common Pleas of Philadelphia County, did issue a written Opinion which is attached hereto. That Opinion is reported at 5 Philadelphia County Reporter 483 (1981)

2. JURISDICTION

The judgment of sentence imposed upon appellant, Robert Santiago by the Court of Common Pleas of Philadelphia County, Pennsylvania, was affirmed, Per Curiam, by the Supreme Court of Pennsylvania on April 27, 1983. Both in the trial Court and on appeal to the Supreme Court of Pennsylvania appellant argued that the Pennsylvania statute creating and defining the crime of second degree murder (felony-murder) is unconstitutional as repugnant to the due process clause of the 14th Amendment to

the United States Constitution because the essential element of malice is conclusively presumed and imputed to the accused when a death results during the perpetration of the felony of arson.

A notice of Appeal to the Supreme Court of the United States was timely filed in the Supreme Court of Pennsylvania on June 1, 1983. A copy of that notice of appeal was also filed with the trial Court on the same date.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257 which provides, inter alia, that: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: ". . .(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

3. CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part that:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law; . . ."

4. STATEMENT OF THE CASE

Appellant, Robert Santiago, was arrested on January 25, 1979 and charged with three counts of murder, arson and related offenses following a fire in a dwelling house in Philadelphia, Pennsylvania in which three persons perished.

Informations were subsequently filed against appellant charging three counts of murder, arson and other offenses.

The Informations charging murder alleged that:

> "ROBERT SANTIAGO DID FELONIOUSLY, WILFULLY, AND OF HIS MALICE AFORETHOUGHT, KILL AND MURDER" (The Victim)

Pennsylvania Law divides the crime of murder into three degrees. 18 Pa. C.S. §2502. Murder of the first degree is a criminal homicide ". . .committed by an intentional killing." Murder of the second degree (the crime here in question) is defined by statute as follows (18 Pa. C.S. §2502 (b)):

> "(b) Murder of the second degree. A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."

Murder of the third degree is simply defined as follows: "All other kinds of murder shall be murder of the third degree." 18 Pa. C.S. §2502 (c).

The "Definitions" section of the statute defines "Perpetration of a felony" as: "The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit . . .arson . . ." (and other enumerated felonies).

At trial, after the prosecution had rested its case, appellant argued to the trial Court that it could not convict him of the crime of murder of the second degree because the statute defining that crime was unconstitutional as repugnant to the Fourteenth Amendment of the United States Constitution. Appellant argued that, as charged in the Information filed against him, "malice" is an essential element of the crime of second degree murder (felony-murder) and that the statute created a conclusive presumption of "malice" merely from the fact that a killing was committed during the perpetration of arson. Appellant argued that such a conclusive presumption was irrebuttable or, at the least, shifted the burden of negating malice to the accused; that it diminished the Commonwealth's burden of proving an essential element of the offense beyond a reasonable doubt; that it conflicted with the presumption of innocence; and that the

statute was therefore unconstitutional in violation of the due process clause of the United States Constitution.

The trial Court rejected this argument and convicted appellant of three counts of murder of the second degree. Appellant filed written motions for a new trial or arrest of judgment in which he renewed his constitutional challenge to the statute. The trial Court rejected that argument once again, denied the motions, and sentenced appellant to three concurrent terms of life imprisonment.

Appellant then filed a direct appeal to the Supreme Court of Pennsylvania. In briefs filed with that Court and at oral argument appellant again argued that the Pennsylvania Statute creating and defining the crime of second degree murder (felony-murder) was unconstitutional as being repugnant to the Fourteenth Amendment to the United States Constitution. The Supreme Court of Pennsylvania rejected that argument and, on April 27, 1983, affirmed the judgments of sentence of the trial Court Per Curiam, without written opinion.

5. REASONS FOR GRANTING THE APPEAL

"Malice" is an essential element of the crime of second degree murder in Pennsylvania. As stated by the Supreme Court of Pennsylvania:

> "Malice express or implied is the criterion and absolutely essential ingredient of murder." Commonwealth v. Young, 494 Pa. 224, 431 A. 2d 230, 232 (1981).

And:

> " 'To sustain a conviction of murder of either degree, the evidence must establish that the killing was committed with malice.'" Commonwealth v. Gardner, 490 Pa. 421, 416 A. 2d 1007, 1008 (1980), quoting Commonwealth v. Taylor, 461 Pa. 557, 337 A. 2d 545 (1975).

The definition of second degree murder in Pennsylvania is a statutory enactment of the common law crime of felony-murder. Felony-murder, like any type of murder, requires that the Commonwealth prove the essential element of "malice" beyond a reasonable doubt.

However, in the case of second degree murder (felony-murder) the essential element of malice is conclusively imputed to the defendant when a death occurs during the perpetration of one of the enumerated felonies. Once it is shown that the accused committed the felony, and a death results during its perpetration, malice is perpetration, malice is conclusively presumed and makes the crime second degree murder. This is true even if there is no other proof or evidence of malice.

> "The common law felony-murder rule is a means of imputing malice where it may not exist expressly. Under this rule, the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the felony." Commonwealth ex rel Smith v. Myers, 438 Pa. 218, 224-225 (1970).

The foundation for the felony-murder rule is the belief that:

> ". . .A reasonable man can be properly charged with the knowledge that the natural and probable consequences of such an act may well result in death or grievous bodily harm to those involved. . ." Commonwealth v. Yuknavich, 448 Pa. 502, 508, 295 A. 2d 290, 293 (1972).

The Commonwealth has the unshifting burden of proving every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The conclusive presumption of malice contained in the Pennsylvania statute defining second degree murder relieves the Commonwealth of that burden of proof with regard to the essential element of malice. Although proof of malice is required, it is said to be conclusively presumed merely because a death resulted during the

perpetration of a felony.

The Supreme Court of Pennsylvania has itself recognized that the presumption of malice is conclusive rather than merely permissive. In Commonwealth v. Yuknavich, 448 Pa. 502, 505, 506 (1972) the appellant argued that the "felony-murder rule should be modified so that a homicide committed by an accomplice during the perpetration of a felony would create only a rebuttable presumption . . ." (emphasis added). The Supreme Court of Pennsylvania rejected that argument as being ". . . a definite departure from the traditional felony-murder rule applied in Pennsylvania."

The theory supporting the conclusive presumption of malice in such a case - - that a "reasonable man can be properly charged with the knowledge that the natural and probable consequences of such an act may well result in death" - - is just the sort of conclusive or mandatory presumption which was held to be unconstitutional by this Court in Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) wherein this Court ruled that a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the due process clause of the Fourteenth Amendment. Such an instruction was repugnant to the Constitution because a reasonable juror could conclude that it was "an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" or "a direction to find intent upon proof of the defendant's voluntary actions - - unless the defendant proved the contrary - - thus effectively shifting the burden of persuasion on the element of intent." Sandstrom v. Montana, supra, at 517, 99 S. Ct. at 2245.

The Pennsylvania statute defining second degree murder suffers from the same infirmaties. The court or jury is directed

to conclusively infer malice upon a showing of the facts triggering the presumption - - the commission of a felony during which death results. The law makes no provision for the accused to be able to rebut the presumption to show the absence of malice. Even if it did, it would still be unconstitutional as shifting the burden of proof.

As stated by the United States Supreme Court in Sandstrom, supra, the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Sandstrom v. Montana, supra, 442 U.S. at 250, 99 S. Ct. at 2457 (1979); In Re Winship, supra.

Such conclusive presumptions have repeatedly been held to be unconstitutional by this Court. In Ulster County Court v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) this Court declared a New York Statute unconstitutional which provided that, with certain exceptions, the presence of a firearm in a vehicle is presumptive evidence of its illegal possession by all persons occupying the vehicle.

In Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952) the defendant was charged with willful and knowing theft of government property. The trial Court had ruled that felonious intent was presumed from the defendant's acts. This Honorable Court reversed because "A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." 342 U.S. at 274-275, 72 S. Ct. 240, 96 L. Ed. 288.

The ruling in Morissette was reaffirmed in United States v. United States Gypsum, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) wherein the trial Court had instructed the jury, in a case charging antitrust violations, that the law

presumes that a person intends the natural consequences of his acts. This Court reversed and stated:

> "(A) defendant's state of mind or intent is an essential element of a criminal antitrust offense which -- cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of effect on prices - -
>
> Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference . . . (u)ltimately, the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function." 438 U.S. at 435, 446, 98 S. Ct. 2864, 57 L. Ed. 2d 854.

Likewise, in the present case, the defendant's state of mind (malice) is an essential element of the criminal offense of murder in the second degree and, although the defendant's action of perpetrating an arson may well support an inference that the defendant knew that death was likely to result, it is unconstitutional to conclusively rely upon the presumption of malice.

Also, in Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 188, 44 L. Ed. 2d 508 (1975), the defendant was charged with murder under Maine law, which required proof of malice. The trial Court instructed the jury that if the prosecution established that the homicide was both intentional and unlawful, malice was to be imputed to the accused unless the accused proved the contrary. Such a presumption was ruled to be unconstitutional and in violation of Due Process of Law.

In the present case the trial Court felt that there was no constitutional infirmity because "A person who willfully and ruthlessly plans and executes the arson of a dwelling house clearly exhibits the wickedness of disposition, hardness of heart, cruelty, recklessness of consequences which constitutes the

malice involved in the crime of murder." (Opinion of the trial Court at page 4).

This is not an answer to the issue. It misstates the issue and misunderstands the nature of appellant's challenge. Appellant is not arguing that it is unreasonable or arbitrary to presume malice from the nature of his actions, See: Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), he is arguing that a mandatory reliance upon the presumption is unconstitutional.

In any event, it is no defense to the unconstitutionality of a conclusive presumption to state that there is sufficient evidence on the record to find guilt or establish the essential element of the crime without employing the presumption.

As this Court stated in Ulster County Court v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 2226, 60 L. Ed. 2d 777, 794 (1979), it is:

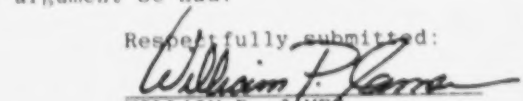
> ". . .irrelevant in analyzing a mandatory presumption . . . that there is ample evidence on the record other than the presumption to support a conviction."
>
> and
>
> ". . .the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases."

For these reasons appellant respectfully submits that the Pennsylvania statute creating and defining the crime of murder in the second degree is unconstitutional and this Honorable Court should request briefs on the merits and oral argument.

6. CONCLUSION

For the foregoing reasons appellant prays that this Honorable Court grant this appeal and order that briefs on the merits be filed and oral argument be had.

Respectfully submitted:



WILLAIM P. JAMES
Attorney for Appellant
Robert Santiago

Supreme Court of Pennsylvania

Eastern District

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	No. 80-3-653
ROBERT SANTIAGO, Appellant	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the JUDGMENTS of the COURT of COMMON PLEAS, TRIAL DIV., CRIMINAL SECTION - PHILADELPHIA COUNTY, be and the same are hereby AFFIRMED.

BY THE COURT:

Marlene F. Lachman

Marlene F. Lachman, Esq.
Prothonotary

Dated: APRIL 27, 1983

[J-109]

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 80-3-653
	:	
	:	Appeal from Judgments of Court of
v.	:	Common Pleas of Philadelphia, Criminal
	:	Trial Division, at Nos. 552, 553, 556,
	:	561 and 563 February Term, 1979,
ROBERT SANTIAGO,	:	entered July 7, 1980
Appellant	:	
	:	ARGUED: April 19, 1983

O R D E R

PER CURIAM: FILED: APRIL 27, 1983

Judgments affirmed.

Commonwealth v. Santiago

Criminal Law—Constitutionality of Pa. Felony-Murder Rule—Probable Cause for Arrest—Voluntariness of Defendant's Statement.

(1) The Pa. felony-murder rule is not unconstitutional since it does not create a conclusive presumption or alter the Commonwealth's burden of proof.

(2) Probable cause for arrest of defendant is established where police have information which shows defendant's presence in the neighborhood, dislike toward the victims and a history of involvement with fire of an incendiary origin.

(3) A statement is not inadmissible where a defendant is confronted with results of a polygraph where under the totality of the circumstances the statement was voluntarily made.

C.P., Phila. Co., February Term, 1979, Nos. 552-563.

Leonard Ross, Assistant District Attorney, for the Commonwealth.

William James, Esquire, for Defendant.

DELLA PORTA, *J.*, March 13, 1981

OPINION

Defendant was charged on Bills of Information Nos. 552-563 with three counts of Murder, Arson, Recklessly Endangering Another Person, Possession of Incendiary Devices, Possession of an Instrument of Crime, Causing and Risking Catastrophe and Criminal Conspiracy. Defendant pleaded not guilty to these charges and was tried before this Court sitting without a jury from May 31 to April 2, 1980, at which time the Court found the defendant guilty of three Murders in the Second Degree, Arson, Causing and Risking Catastrophe. The defendant was found not guilty of Possession of Incendiary Devices and Criminal Conspiracy. Sentence was deferred pending filing of post-trial motions and for preparation of pre-sentence and psychiatric evaluation reports.

Motions for New Trial and In Arrest of Judgment were duly filed and on July 7, 1980, were argued before this Court and Denied. On that day, the defendant was sentenced on Bills No. 553, No. 556 and No.

563 to three concurrent terms of Life Imprisonment in The State Correctional Institution, and on Bill No. 552 to another concurrent term of 10-20 years. Sentence was suspended on Bill No. 561. Bills No. 554, No. 555 and No. 562 charging Involuntary Manslaughter were merged into the Murder Bills and Bills No. 558 charging Possession of Instrument of Crime and No. 560 charging Recklessly Endangering Another Person were nolle prossed.

Defendant has appealed and we file this opinion as required.

Viewing the evidence in a light most favorable to the Commonwealth, *Commonwealth v. Brown*, 467 Pa. 388, 357 A.2d 147 (1976); *Commonwealth v. Mangini*, 478 Pa. 147, 386 A.2d 483 (1978); *Commonwealth v. Smith*, Pa. , 398 A.2d 948 (1979), the testimony indicated that on January 23, 1979, at 3:00 A.M., the defendant went to 919 West Butler Street, a house with an enclosed porch, in the City of Philadelphia, poured a can of gasoline through the mail slot of the porch door and ignited it with a match. The resulting fire burned the house and caused the death of Ocie Stokes, Rochelle Stokes and Nellie Stokes, three of its occupants.

Defendant argues that his conviction should be reversed in that the Pennsylvania Second Degree Murder Statute is unconstitutional. It provides: "A criminal homicide constitutes murder of the second degree when the death of the victim occurred while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. C.S.A., Sec. 2502(b).

Defendant contends that the above statutory language is unconstitutional in that it creates an unlawful conclusive presumption, diminishes the Commonwealth's burden of proof and violates due process of law. The statutory language attacked by defendant is

a codification of the felony murder doctrine of the Pennsylvania Common Law.

> As applied in Pennsylvania, common law felony-murder 'is a means of imputing malice where it may not exist expressly. Under this rule the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the initial felony.' Comm. ex rel. Smith v. Myers, 438 Pa. 218, p. 224-225, 261 A. 2d 550, 553 (1970).
>
> The nature of the felony in this case is such that it should be obvious to anyone about to embark on such a venture that the lives of the victims may be sacrificed in accomplishing the end. A reasonable man can be properly charged with the knowledge that the natural and probable consequences of such an act may well result in death or grievous bodily harm to those involved.

Comm. v. Yuknavich, 448 Pa. 502, 506, 508, 295 A.2d 290, 292, 293 (1972).

In the instant case, we find the presence of no conclusive presumption nor the failure of the Commonwealth to carry its burden of proving every element of the crime beyond a reasonable doubt. A person who willfully and ruthlessly plans and executes the arson of a dwelling house clearly exhibits the wickedness of disposition, hardness of heart, cruelty, recklessness of consequences which constitutes the malice involved in the crime of murder. The defendant's conviction of murder in the second degree under the circumstances of this case suggests no constitutional infirmity. *See: Commonwealth v. Rose*, 457 Pa. 380 (1974).

Defendant argues that it was error to admit at trial the inculpatory statement made by him while in

police custody in that it was the product of an illegal arrest and was not preceded by a knowing, voluntary, intelligent waiver of his constitutional rights.

The arrest of the defendant was found to be lawful and based on the required probable cause.

> . . . probable cause exists if the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime.

Commonwealth v. Garvin, 448 Pa. 258 (1973); *Brinegan v. U.S.*, 338 U.S. 160 (1949).

In the instant case, after being advised by the Fire Marshall that the fire was of incendiary origin, Detective Anderson personally, and through Detective Alexander, interviewed witnesses and obtained the criminal record of defendant. The cumulative weight of the information obtained indicated that defendant was in the neighborhood at the time of the fire, disliked and displayed ill will towards one of the victims and had a history of involvement with fires of incendiary origin. Since this information was sufficient to establish probable cause, the arrest was lawful and did not taint any statements subsequently obtained.

As to the issue of voluntariness, the Commonwealth has the burden of showing by a preponderance of the evidence that the defendant made a knowing, intelligent, voluntary waiver of his constitutional rights. *Commonwealth ex rel. Butler v. Rundle*, 429 Pa. 141 (1968); *Lego v. Twomey*, 404 U.S. 477 (1972); *Commonwealth v. Moore*, 454 Pa. 337 (1974).

> The determination of whether there has been an intelligent waiver of right to counsel must depend in each case upon the particular facts and circumstances surrounding that case, in-

cluding the background, experience and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 1023 (1968).

This defendant was arrested on January 25, 1979 at 8:10 A.M., at his residence by detectives armed with an arrest warrant. At 8:25 A.M., he arrived at the Police Administration Building and, after being placed in an interrogation room at Homicide Headquarters, was properly advised by police of his constitutional rights. Defendant indicated by his answers that he wished to waive those rights. Defendant made two initial exculpatory statements but after being confronted with the results of a polygraph examination, gave an oral and then a written inculpatory statement between 10:45 A.M. and 12:40 P.M. All of the circumstances surrounding the statements of the defendant have been examined by this Court and we agree with the findings and conclusions of the Honorable THEODORE SMITH who was the presiding judge at the hearings on the motion to suppress. At the time of his arrest, the defendant was 22 years of age. He was alert, responsive and neither his mental nor physical conditions were such as to impair his ability to contend with police questioning. He was not suffering from lack of sustenance nor coerced at any time by the police. The defendant was cognizant of all that was taking place and knowingly and of his own volition waived his constitutional rights and made the statement. Under the totality of the circumstances test, we find that the statements were voluntarily made. *Commonwealth v. Hughes*, 383 A.2d 382 (1978).

Defendant lastly argues that the verdict was contrary to the weight of the evidence and the law. In *Commonwealth v. Tate*, Pa. , 401 A.2d 353, 354 (1979), the Court stated:

To evaluate the sufficiency of the evidence, we must view the evidence in the light most favorable to the commonwealth as verdict winner, accept as true all the evidence and all reasonable inferences upon which, if believed, the jury could properly have based its verdict, and determine whether such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt. Moreover, it is the province of the trier of fact to pass upon the credibility of witnesses and the weight to be accorded the evidence produced. The factfinder is free to believe all, part or none of the evidence. Commonwealth v. Yost, 478 Pa. 327, 386 A.2d 956 (1978).

A fair reading of the testimony in this case clearly indicates that this test was fully met.

Therefore, we have heretofore denied defendant's Motions for New Trial and In Arrest of Judgment and imposed sentence.

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 80-3-653

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT SANTIAGO,
Appellant

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITLD STATES

Notice is hereby given that ROBERT SANTIAGO, the above named appellant, hereby appeals to the SUPREME COURT OF THE UNITED STATES from the Judgment and Order of the Supreme Court of Pennsylvania entered on the 27th day of April, 1983, which affirmed the judgments of the Court of Common Pleas, trial division, criminal section, of Philadelphia County as of February Term, 1979, Nos. 552, 553, 556, 561 and 563.

This appeal is taken to the Supreme Court of the United States pursuant to the authority of 28 U.S.C. §1257.

William P. James

WILLIAM P. JAMES
Attorney for Appellant
915 Robinson Building
42 So. 15th Street
Philadelphia, Pa. 19102-2268
(215) 569-2525

NO. 82-6950

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT SANTIAGO,
Appellant

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Counsel for Appellant:

WILLIAM P. JAMES
915 Robinson Building
42 So. 15th Street
Philadelphia, Pennsylvania
19102-2268
(215) 569-2525

MOTION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Motion of Robert Santiago, Appellant, requests leave to proceed on appeal in forma pauperis and in support of said motion, respectfully represents:

1. This Motion is being filed pursuant to Rule 46 of the Rules of the Supreme Court of the United States, with an affidavit in the form prescribed by F.R.A.P. Form 4 and the statutory requirements of 28 U.S.C. §1915.

2. Appellant, Robert Santiago, is unable to afford the fees and costs of appeal, including the printing of the briefs and record, jurisdictional statement and other papers.

3. Appellant, Robert Santiago, was granted leave to proceed, and did proceed, in forma pauperis with court appointed counsel in the trial court and on appeal to the Supreme Court of Pennsylvania. Leave to so proceed was granted by the Court of Common Pleas of Philadelphia County, Pennsylvania, on November 29, 1979.

4. Appellant, Robert Santiago is incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania.

5. There has been no substantial change in appellant's financial circumstances since the date he was granted leave to proceed in forma pauperis by the trial Court.

WHEREFORE, appellant, Robert Santiago, requests leave to proceed in forma pauperis on appeal to the Supreme Court of the United States.

William P. James

WILLIAM P. JAMES
Attorney for Appellant
Robert Santiago

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT SANTIAGO,
Appellant

PROOF OF SERVICE

I hereby certify that on the day of ,1983 I served a true and correct copy of Motion for leave to proceed in forma pauperis and affidavit in support thereof upon the person and in the manner indicated below, which service satisfies the requirements of Rules 10 and 28 of the Rules of the Supreme Court of the United States. I certify that all parties required to be served, as indicated below, have been served.

Service by hand delivery to the office of:

Robert Lawler, Esquire
Chief, Appeals Division
Philadelphia District Attorney
1300 Chestnut Street
Philadelphia, PA 19107

WILLIAM P. JAMES
Attorney for Appellant
Robert Santiago

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT SANTIAGO,
Appellant

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, ROBERT SANTIAGO, being first duly sworn, depose and say that I am the appellant in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1. Is the Pennsylvania statute defining murder in the second degree (felony-murder) unconstitutional in violation of the due process clause of the 14th Amendment of the United States Constitution because the essential elements of intent and malice are conclusively presumed and imputed to the perpetrator when a death results during the perpetration of the crime of arson?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO.

(a) If your answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1978. $230.00 monthly

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO.

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO.

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

(a) If the answer is yes, describe the property and state its approximately value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NO

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert Santiago
ROBERT SANTIAGO

Sworn to and subscribed
before me this 6 day
of June, 1983.

Notary Public

RICHARD L. MEALIS, NOTARY PUBLIC
SMITHFIELD TWP., FAYETTE COUNTY
MY COMMISSION EXPIRES JUNE 4, 1984
Member, Pennsylvania Association of Notaries

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE

NO. 82-6950

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

ROBERT SANTIAGO, Appellant

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA
(PENNSYLVANIA SUPREME COURT NO. 80-3-653)

MOTION OF APPELLEE TO DISMISS OR AFFIRM

ERIC B. HENSON
Deputy District Attorney
(Counsel of Record)
STEVEN J. COOPERSTEIN
Assistant District Attorney
EDWARD G. RENDELL
District Attorney
Philadelphia County

District Attorney's Office
1300 Chestnut Street
Philadelphia, Pa. 19107
(215) 875-6010

August 12, 1983

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MOTION TO DISMISS OR AFFIRM

Appellee, the Commonwealth of Pennsylvania, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the Supreme Court of Pennsylvania, affirming appellant's judgments of sentence, on the ground that the question is so insubstantial as not to warrant further argument.

QUESTION PRESENTED

Should this Court dismiss this appeal or, in the alternative, affirm an order of the Pennsylvania Supreme Court, upholding the Pennsylvania felony-murder rule as applied to defendant's convictions for a triple arson-murder?

STATEMENT OF THE CASE

Defendant Robert Santiago appeals from the April 27, 1983, order of the Supreme Court of Pennsylvania, affirming the judgments of sentence imposed upon him for three counts of murder and one count of arson. The factual and procedural history of this appeal is as follows.

Defendant was tried and convicted for arson and for the triple murders of Ocie Bell Stokes, aged forty-two years, and her two young daughters, Rochelle, aged fifteen, and Nellie, aged thirteen. The defendant killed the victims by burning their home at 919 West Butler Street in Philadelphia during the early morning hours of January 23, 1979. The Stokes family had lived at this address for eleven years. The only person to escape, James Stokes, Ocie's husband and the children's father, was forced to stand by helplessly while his house and family perished in the flames (N.T. 2.91-2.98). Defendant's fire also destroyed several nearby residences and left others homeless (N.T. 2.19-2.20, 2.30-2.33, 2.139-2.144).

Officer John Thompson testified that at approximately 3:00 a.m., on the morning of January 23, 1979, he noticed flames and smoke in the 900 block of West Butler Street. When Officer Thompson went there, he encountered Mr. Stokes, whose family was trapped inside one of the burning buildings. Access from the front of the homes was impossible due to the rapidly spreading fire and intense heat (N.T. 2.18-2.28). Fire department personnel arrived within two minutes, but the fire, which went to two alarms, was not brought under control until 3:25 a.m. (N.T. 2.135-2.138). The charred bodies of the three victims were later found in the upstairs middle bedroom at 919 West Butler Street (N.T. 2.141-2.142).

Lt. John Quinn, an Assistant Fire Marshall (N.T. 2.133), testified that he found the victims, and that his investigation revealed that the fire was of an incendiary origin. The fire was

set just inside the porch area of the Stokes home at 919 West Butler Street; it was accelerated by a substantial amount of flammable liquid, and the liquid was poured into the area of the mail slot and then ignited with an open flame (N.T. 2.142-2.146, 2.155-2.162).

On the evening before the fire, defendant witnessed an argument involving Valda Gibbons, the sister of defendant's former girlfriend, and Rochelle Stokes, one of the victims (N.T. 2.37-2.40, 2.49, 2.71-2.73). Although the argument did not directly involve him, defendant disliked Rochelle, and he threatened that someone would "get" her because she was always minding defendant's business (N.T. 2.75-2.76). Defendant made good his threat. Rochelle, her mother, and her younger sister died in a fire early the next morning. As the fire trucks were arriving, defendant was heard knocking on the door of the Gibbons home and calling for his former girlfriend, Cassandra ("Sandra") Gibbons (N.T. 2.52-2.53, 2.58). When no one answered the door, he left. Several minutes later, someone else came to tell the Gibbons youngsters that Rochelle's house was on fire (N.T. 2.54-2.55).

Defendant was arrested pursuant to a warrant on January 25, 1979. After waiving his Miranda rights, defendant gave a full statement in which he admitted that he poured gasoline into the mail slot of Rochelle's home; that he lit the gasoline with a match; and that he then went to Cassandra Gibbons' house where he banged on the door, but no one let him in. Defendant also admitted that he set the fire in order to "get even" with Rochelle (N.T. 3.23-3.29).

The Honorable Theodore B. Smith, Jr., denied defendant's motion to suppress his inculpatory statement. The case then proceeded to a bench trial before the Honorable Armand Della Porta who, after hearing the Commonwealth's uncontradicted evidence, adjudged defendant guilty of three counts of second degree murder, arson, and causing and risking a catastrophe (Information Nos.

552, 553, 556, 561 and 563, February Session, 1979). Post-verdict motions were subsequently denied, and defendant was sentenced to three concurrent terms of life imprisonment for the murders of Ocie, Rochelle, and Nellie Stokes, and a concurrent term of ten to twenty years for arson. Sentence was suspended on the remaining charge.

Defendant appealed the judgments of sentence to the Supreme Court of Pennsylvania, pursuant to 42 Pa.C.S.A. §722. The Court affirmed by per curiam order dated April 27, 1983. Commonwealth v. Robert Santiago, 458 A.2d 939 (Pa. 1983).

This appeal, which defendant asserts is pursuant to 28 U.S.C. §1257(2), followed. Defendant renews his claim, that was rejected by the Pennsylvania courts, that 18 Pa.C.S.A. §2502(b), which classifies as murder in the second degree a homicide committed in the perpetration of certain enumerated felonies, denies him due process of law in violation of the fourteenth amendment to the United States Constitution.

ARGUMENT

Defendant claims that the Pennsylvania criminal homicide statute, in perpetuating the felony-murder rule, establishes a presumption of malice that violates his due process rights. 18 Pa.C.S.A. §2502(b) (a copy of the entire Pennsylvania criminal homicide statute is attached as Exhibit A). The Pennsylvania courts correctly rejected this claim that the felony-murder rule violates the fourteenth amendment.

Defendant alleges that Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979) invalidated the felony-murder rule. This Court did not in Sandstrom, however, enter a constitutional ukase against this venerable doctrine which relieves the state of none of its burden of proof. Whether homicides committed in perpetration of felonies should be punished as murders is a policy question of statutory or decisional law; this question does not implicate the constitutional burden of proof in criminal cases.

Sandstrom forbids the state to shift the burden of proof of any necessary element of an offense to the defendant. Sandstrom was charged with "deliberate homicide," which included as an element that the accused acted purposely or knowingly. The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 513, 2453. This Court held that the trial court's instruction violated Sandstrom's due process rights because to presume conclusively from a defendant's acts the intent element necessary to sustain a conviction for deliberate homicide deprives the accused of his presumption of innocence and places on him a burden of proof.

Pennsylvania's felony-murder rule does not similarly deprive an accused of his presumption of innocence or place on him a burden of proof. Murder is defined by Pennsylvania case law as an unlawful killing with malice. Commonwealth v. Weinstein, 451 A.2d 1344

(Pa. 1982); Commonwealth v. Young, 494 Pa. 224, 431 A.2d 230 (1981). The felony-murder doctrine is a means of defining malice. It is a judicial judgment that: ". . . the willingness to participate in conduct amounting to a felony exhibited the recklessness of consequences, the callous disregard and the hardness of heart which evidenced a malicious state of mind." Commonwealth v. Allen, 475 Pa. 165, 169, 379 A.2d 1335, 1336-1337 (1977). Far from establishing a presumption of intent, the felony-murder doctrine provides that malice is shown only when the Commonwealth proves beyond a reasonable doubt that the accused intentionally participated in a specific felony during which the homicide occurred. Commonwealth v. Allen, supra; Commonwealth v. Yuknavich, 448 Pa. 502, 295 A.2d 290 (1972) (same statutory scheme under prior law, 18 P.S. (former) §4701). Thus, the felony-murder doctrine is a definition of malice; it does not involve a presumption that shifts from the prosecution its burden of proof. The felony-murder doctrine does not violate an accused's due process rights.

Moreover, the felony-murder rule is constitutional even if it is viewed as establishing an evidentiary presumption. An evidentiary presumption in a criminal case is constitutional if ". . . it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 1548 (1969). See also County Court of Ulster County v. Allen, 442 U.S. 140, 99 S. Ct. 2213 (1979). Here, indisputably, proof of a person's intent to engage in the dangerous felonies enumerated in the statute, i.e., robbery, rape, involuntary deviate sexual intercourse, arson, burglary and kidnapping, 18 Pa.C.S.A. §2502(d), meets this more likely than not standard. Such proof unmistakably gives rise to the inference that the actor had the recklessness or hardness of heart necessary to establish malice. Thus, the "presumed fact," malice, clearly

is more likely than not to stem from the "proved fact," commission of a dange us felony.

The Pennsylvania courts correctly rejected defendant's claim. The question presented is so insubstantial as not to warrant further argument.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or affirmed.

Respectfully submitted,

ERIC B. HENSON
Deputy District Attorney
(Counsel of Record)
STEVEN J. COOPERSTEIN
Assistant District Attorney
EDWARD G. RENDELL
District Attorney

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	OCTOBER TERM, 1983
v.	:	
	:	
ROBERT SANTIAGO, Appellant	:	NO. 82-6950

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Appellee, hereby certify that I have served three (3) copies of this Motion of Appellee to Dismiss or Affirm on counsel for appellant, William P. James, Esquire, 915 Robinson Building, 42 South 15th Street, Philadelphia, Pennsylvania 19102, by first class mail, postage prepaid, on August 9, 1983.

Eric B. Henson

ERIC B. HENSON, Esquire
Deputy District Attorney
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 9th day :
of August, 1983, A.D. :

Joyce M. Nicholas
NOTARY PUBLIC

My Commission Expires: 9/19/83

JOYCE M. NICHOLAS
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1983

CHAPTER 25

CRIMINAL HOMICIDE

Sec.
2501. Criminal homicide.
2502. Murder.
2503. Voluntary manslaughter.
2504. Involuntary manslaughter.
2505. Causing or aiding suicide.

§ 2501. Criminal homicide

(a) **Offense defined.**—A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.

(b) **Classification.**—Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

Historical Note

Model Penal Code:

This section is similar to section 210.1 of the Model Penal Code.

Library References

Homicide ⇔1.
C.J.S. Homicide § 1 et seq.

P.L.E. Homicide § 1.

Notes of Decisions

1. Arson-murder

In order to convict defendant of arson-murder, jury must find beyond reasonable doubt that defendant wilfully caused fire which caused death. Com. v. May, 301 A.2d 388, Sup.1973.

§ 2502. Murder

(a) **Murder of the first degree.**—A criminal homicide constitutes murder of the first degree when it is committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing. A criminal homicide constitutes murder of the first degree if the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.

(b) **Murder of the second degree.**—All other kinds of murder shall be murder of the second degree. Murder of the second degree is a felony of the first degree.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

with two Judges concurring, one Judge concurring specially, and one Judge concurring in result.) Com. v. Garcia, 373 A.2d 1199, 474 Pa. 449, 1977.

Chapter 25 of Crimes Code governing homicide creates one major homicide offense, that of criminal homicide, and the several types of homicide, namely, murder of any of the three named degrees and voluntary and involuntary manslaughter, are constituent subsidiary offenses within the single major offense; all grades of unlawful killing thus have been made lesser included offenses of the overall crime of criminal homicide. (Per Pomeroy, J., with one Judge concurring and three Judges concurring specially.) Com. v. Polimeni, 378 A.2d 1189, 474 Pa. 430, 1977.

Differences between classifications of criminal homicide are largely a function of the state of mind of perpetrator. (Per Pomeroy, J., with one Judge concurring and three Judges concurring specially.) Id.

§ 2502. Murder

(a) **Murder of the first degree.**—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) **Murder of the second degree.**—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) **Murder of the third degree.**—All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) **Definitions.**—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Fireman." Includes any employee or member of a municipal fire department or volunteer fire company.

"Hijacking." Any unlawful or unauthorized seizure or exercise of control, by force or violence or threat of force or violence.

"Intentional killing." Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

"Perpetration of a felony." The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." A person who is the actor or perpetrator of the crime.

as amended 1974, March 26, P.L. 213, No. 46, § 4, imd. effective; 1978, April 28, P.L. 84, No. 39, § 1, effective in 60 days.

Section 5 of Act 1974, March 26, No. 46, effective immediately, provides as follows: "If any subparagraph, paragraph, or subsection of section 2502 of the Crimes Code, as amended by this act, [section 2502 of this title] or any other provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other subparagraphs, paragraphs, subsections, provisions or applications of the act which can be given effect without the invalid subparagraph, paragraph, subsection, provision or application, and to this end the provisions of this act are declared to be severable."

1974 Amendment: Made substantial changes in subsections (a) and (b), and added new subsections (c) and (d).

1978 Amendment: In subsection (b), substituted words "it is committed" for words "the death of the victim occurred".

Cross References

Crime victim's compensation board, see 71 P.S. § 180-7 et seq.

Homicide by vehicle, see 75 Pa.C.S.A. § 3732.

Intoxication or drugged condition reducing degree of murder, see § 308 of this title.

Mental health procedures, see 50 P.S. § 7304.

Sentence for second degree murder, see section 1102 of this title.

Sentencing for murder, see 42 Pa.C.S.A. § 9711.

Law Review Commentaries

Battered spouse syndrome as a defense to a homicide charge under this chapter. (1980-81) 26 Vill.L.Rev. 104.

Suggested standard jury instructions on criminal homicide. Arthur A. Murphy, (1980) 85 Dick.L.Rev. 1.

Use of psychiatric testimony in homicide trial. (1973) 47 Temple L.Q. 184.

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§ 2503. Voluntary manslaughter

(a) **General rule.**—A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed; or

(2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

(b) **Unreasonable belief killing justifiable.**—A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable.

(c) **Grading.**—Voluntary manslaughter is a felony of the second degree.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

Historical Note

Prior Laws:

1939, June 24, P.L. 872, § 702 (18 P.S. § 4703).

Cross References

Appeal, see 19 P.S. §§ 1180, 1187 and 1264.
Classes of offenses, see section 106 of this title.
Divorce, grounds, see 23 P.S. § 10.
Indictment, manslaughter, see 19 P.S. § 351.
Jurisdiction of offense, see 17 P.S. §§ 391 and 694.
Penalties, see section 1101 et seq. of this title.
Serious provocation, see section 2301 of this title.

Library References

Homicide ⇐⇒33.
C.J.S. Homicide § 40 et seq.

P.L.E. Homicide § 32.

Notes of Decisions

Note 28

which it was rendered, new trial must be denied. Com. v. Noto, 25 Lack. 203, 1933.

28. Sentence and punishment

Sentence of five to ten years' imprisonment and fine of $100 was within statutory limits for crime of voluntary manslaughter. Com. v. Person, 450 Pa. 1, 297 A.2d 460, Sup.1972.

Manslaughter is a noncapital offense and cannot be punished by death. Com. ex rel. Wilson v. Banmiller, 143 A.2d 647, 393 Pa. 530, 1958.

On conviction of unlawful manufacture and possession of intoxicating liquor and of manslaughter resulting from illegal operation of still, it was proper to sentence defendants separately for each offense. Com. v. Mango, 101 Pa.Super. 385, 1931.

A person convicted of voluntary manslaughter might be sentenced to the state penitentiary or the county prison in the discretion of the court. Com. v. Ferguson, 24 Del.Co. 152, 1947.

Where a person convicted of voluntary manslaughter had been sentenced to the state penitentiary the court might amend the sentence to imprisonment in the county jail. Id.

Courts of county have option of sentencing prisoner convicted of voluntary manslaughter to county jail or to state penitentiary. Com. v. Prince, 25 Del.Co. 133, 1934.

30. Review

Defendant could not raise on appeal failure of trial court to instruct concerning effect of intoxication on finding of passion where he failed to except to that portion of charge. Com. v. Martin, 269 A.2d 722, 440 Pa. 180, 1970.

Under an indictment charging murder and manslaughter, and evidence establishing murder in the first degree in the perpetration of a robbery, defendant could not complain of being convicted of manslaughter. Com. v. Kellyon, 122 A. 166, 278 Pa. 59, 1923.

§ 2504. Involuntary manslaughter

(a) General rule.—A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.

(b) Grading.—Involuntary manslaughter is a misdemeanor of the first degree.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

Historical Note

Prior Laws:

1939, July 24, P.L. 872, § 703 (18 P.S. § 4703).

Cross References

Appeal, see 19 P.S. §§ 1186, 1187 and 1264.
Bail, involuntary manslaughter by automobile, see 19 P.S. § 51; 23 P.S. § 2[illegible].
Classes of offenses, see section 106 of this title.
Divorce, grounds, see 23 P.S. § 10.
Indictment for,
Involuntary manslaughter, see 19 P.S. § 352.
Manslaughter, see 19 P.S. § 351.
Jurisdiction of offense, see 17 P.S. §§ 391 and 494.
Penalties, see section 1101 et seq. of this title.
Serious provocation, see section 2301 of this title.

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ORIGINAL

NO. 82-6950

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

ROBERT SANTIAGO,
Appellant

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA (NO.80-3-653)

ANSWER TO MOTION TO DISMISS OR AFFIRM

WILLIAM P. JAMES
915 Robinson Building
Philadelphia, Pa. 19102-2268
(215) 569-2525
Attorney for Appellant

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TABLE OF AUTHORITIES

ANSWER TO MOTION TO DISMISS OR AFFIRM

Appellant, Robert Santiago, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves this Honorable Court to deny the motion of the Commonwealth of Pennsylvania to Dismiss or Affirm because the question presented is so substantial as to warrant further argument.

COUNTER STATEMENT OF THE QUESTION PRESENTED

Should this Honorable Court dismiss the appeal or affirm an order of the Supreme Court of Pennsylvania which had affirmed appellant's conviction wherein appellant had argued that the statutory felony-murder rule of Pennsylvania is unconstitutional because it creates a mandatory and conclusive presumption of the essential element of malice and thus violates due process of law, conflicts with the presumption of innocence and dilutes the Commonwealth's burden of proof beyond a reasonable doubt?

COUNTER STATEMENT OF THE CASE

Appellant does not disagree with the factual and procedural history of the case which has been set forth by the Commonwealth of Pennsylvania. However, appellant does submit that such history is irrelevant because appellant is attacking the Pennsylvania felony-murder statute on its face and because where a case involves an unconstitutional mandatory or conclusive presumption it is irrelevent that there may otherwise be sufficient proof on the record to sustain the conviction. Thus even if, as the Commonwealth argues, the facts would otherwise be sufficient to establish the essential element of "malice", the conviction is none the less invalid because the Pennsylvania felony-murder statute (reproduced in the Appendix of the Commonwealth's Motion to Dismiss or Affirm) is unconstitutional on its face because the essential element of malice is conclusively presumed merely from proof that a death resulted during the perpetration of a felony, without any independent evaluation of whether the facts of the case otherwise demonstrate "malice." See: Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979).

ARGUMENT

The State of Pennsylvania misperceives the constitutional infirmity of the Pennsylvania second degree murder statute (felony-murder) and basis for appellant's argument in this Honorable Court. Appellant does not attack the constitutionality of the felony murder rule itself. It may be constitutional to presume malice from the commission of a dangerous felony, as long as the presumption is not conclusive or mandatory. That is not the issue in this appeal. The State is confusing the law of Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969) (a presumption is constitutional if it can be said with substantial assurance that the presumed fact is more likley than not to flow from the proved fact on which it is made to depend) with the law announced in such cases as Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) (which invalidates presumptions which, although they may satisfy the requirements of Leary, are conclusive or have the effect of shifting the burden of proof as to an essential element of the offense). Thus, appellant is not arguing, as the State suggests that "Sandstrom v. Montana...invalidated the felony-murder rule." What appellant is arguing is that the Pennsylvania second degree murder statute is unconstitutional because it creates a conclusive presumtpion of malice merely because a death resulted during the perpetration of a felony.

The State admits, as it must, that "malice" is an essential element of the three degrees of murder which are defined by statute in Pennsylvania, including second degree murder (felony-murder). The statute is unconstitutional because all the state need show is that a death resulted during a named felony. Once that showing is made, malice is conclusively presumed. It cannot even be rebutted.

The Pennsylvanis statute conclusively imputes malice even if it may not exist expressly and even if the killing is accidental. Commonwealth ex rel Smith v. Myers, 438 Pa. 218, 224-225 (1970).

The conclusive presumption of malice which testimony cannot overthrow effectively eliminates malice as an ingredient of the offense. That is unconstitutional. Morissette v. United States, 342 U.S. 246, 274-275, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952).

As in United States v. United States Gypsum, 438 U.S. 422, 435, 446, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), "...an essential element of a criminal...offense...cannot be taken from the trier of fact through reliance on a legal presumption..." and although the defendant's acts may well support an inference of malice "...the jury must remain free to consider additional evidence before accepting or rejecting the inference..."

The State has the unshifting burden of proving every element of an offense. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conclusive presumption conflicts with the presumption of innocence and invades the fact finding function. Sandstrom v. Montana, supra, 442 U.S. at 523, 99 S.Ct. at 2459. Such presumptions are also unconstitutional if they have the effect of shifting the burden of persuasion to the defendant.

In Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) this Honorable Court invalidated a New York statute which provided that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all occupants. Such a statute was unconstitutional because "...it tells the trier that he or they must find the elemental fact upon proof of the basic fact..." That is precisely what the Pennsylvania second degree murder statute does.

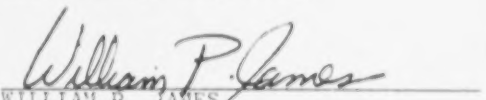
In Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) the jury was told that if the prosecution established that a killing was both intentional and unlawful, malice is imputed unless the defendant proved the contrary. Such a presumption was held to violate due process of law.

There is ample authority for appellant's appeal. The issue is substantial. It merits further review. It is respectfully submitted that it is not "manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" as required by Rule 16. The State has not argued that the case does not present a substantial federal question.

CONCLUSION

For the reasons stated herein it is respectfully submitted that the Appellee's Motion to Dismiss or Affirm should be denied.

Respectfully submitted,



WILLIAM P. JAMES
Attorney for Appellant
Robert Santiago

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA :

vs. : NO. 82-6950

ROBERT SANTIAGO,
Appellant

CERTIFICATE OF SERVICE

I, William P. James, Counsel for appellant, hereby certify that I have served a copy of this Answer to the Commonwealth's Motion to Dismiss or Affirm upon counsel for appellee, Eric B. Henson, Esquire, Deputy District Attorney, 1300 Chestnut Street, Philadelphia, Pa. 19102 by first class mail, postage prepaid, on August 16, 1983, which service satisfies the requirements of Rule 28 of the Rules of the Supreme Court of the United States. I certify that all parties required to be served have been served.

William P. James

WILLIAM P. JAMES